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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-6212

GREGORY NORTON, JR., etc.,
Appellant,

v.

F. DAVID MATHEWS, Secretary,
Department of Health, Education,
and Welfare,
Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF MARYLAND

REPLY BRIEF FOR APPELLANT

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The following comments reply to the Government's assertions that jurisdiction is lacking in this case and that the challenged statutory provision can pass constitutional scrutiny. Appellant also brings several recent federal court decisions to the Court's attention, most of which have attempted to apply the import of

Weinberger v. Salfi, ____ U.S. ____, 95 S.Ct. 2457 (1975), to other constitutional challenges to portions of the Social Security Act.

I.

JURISDICTION

The Secretary asserts that because injunctive and class-wide relief are congressionally barred in a case such as this, a three-judge court was not required to entertain appellant's complaint and accordingly proper jurisdiction over this appeal lies in the Fourth Circuit.

The Secretary has, in effect, asserted that Rules 23 and 65 of the Federal Rules of Civil Procedure have no applicability to a case such as appellant has brought. He argues that Congress, by enacting 42 U.S.C. § 405(g), intended to bar class suits, thereby "permitting adjudication only of individual claims" (Govt. Br. 12), and "must be deemed to have barred courts from entertaining requests for broad injunctive relief. . . ." (Govt. Br. 22).

The Secretary points to no congressional language or history to support this unique thesis. Congress has, however, granted social security claimants the right to bring "a civil action" to challenge any decision of the Secretary. *See* 42 U.S.C. § 405(g). This "civil action" would seemingly be no different than that which is covered by Fed. R. Civ. P. 2 & 3. There is every indication in the Rules that they all apply, if their conditions are met, "to all suits of a civil nature. . . ." Fed. R. Civ. P. 1. Social security benefit cases have not been excluded from the Rules' coverage. *See* Fed. R. Civ. P. 81.

All or a part of appellant's class should not be automatically deprived of their rights to emergency or temporary injunctive relief under Fed. R. Civ. P. 65(a) & (b). Injunctive relief is mandatory to force the Secretary to enforce a court's declaration of the invalidity of a portion of the Social Security Act. The Secretary has not stopped enforcing the "support or residency" requirements even though the federal courts in *Tanner v. Weinberger*, ____ F.2d ____, 44 U.S. L. Wk. 2209 (6th Cir. 1975), and *Lucas v. Weinberger*, 390 F.Supp. 1310 (D.R.I. 1975), *appeal pending* No. 75-88, have held them to be unconstitutional. A litigant should surely have the right to establish his or her irreparable harm and likelihood of success on appeal and thereby secure prompt and complete injunctive relief. Without the availability of injunctive relief, the Secretary is guaranteed an automatic stay of judgment. And if proper compliance were not forthcoming after this Court's final constitutional mandate, a district court should have the injunctive tool to enforce its judgment. *Compare Bell v. Hood*, 327 U.S. 678, 684 (1946). As the Second Circuit has noted,

> The power to declare an action of the legislative or executive branch unconstitutional is an empty one if the judiciary lacks a remedy to stop or prevent the action.

Bivens v. Six Unknown Named Agents, 409 F.2d 718, 723 (1969), *aff'd* 403 U.S. 388 (1971).

The inconsistent federal court rulings on this issue also highlight the propriety of class relief to eliminate the risk of "inconsistent or varying adjudications . . . which could establish incompatible standards of conduct" for the Secretary and an unnecessarily adverse *res judicata* effect upon a claimant who has already lost this constitutional fight. *See* Fed. R. Civ. P. 23(b)(1).

As the Seventh Circuit has pointed out in *Jimenez v. Weinberger*, 523 F.2d 689 (1975) (Stevens, J.), there is no bar in 42 U.S.C. § 405(g) or *Weinberger v. Salfi, supra,* to class relief in a case such as this. Section 405(g) contains three major exhaustion requirements, each of which has been met by the class in this case.

First, judicial review can only be had after "a final decision of the Secretary made after a hearing." 42 U.S.C. § 405(g). As in *Jimenez II,* appellant's class consists of those denied benefits "solely" because they cannot meet the challenged portion of the Act (App. 35). *See* 523 F.2d at 695 n.10. By necessity, therefore,

> the class whose claims were properly before the district court was made up of applicants whose applications had progressed to a high enough level in the administrative proceedings where it could be . . . determined "that the claim[s] [were] neither otherwise invalid nor cognizable under a different section of the Act."

Id. quoting *Salfi v. Weinberger, supra*, 95 S.Ct. at 2467. To again quote *Jimenez II:*

> If the class is defined in this way, the exhaustion concerns embodied in § 405(g) and discussed in *Salfi* are satisfied. Thus, with respect to such a class, a "final decision of the Secretary" has been rendered, and judicial review in the district court was appropriate.

523 F.2d at 695 n.10.

As the *Jimenez II* court again instructs, the second requirement of section 405(g) – commencement of an action within 60 days after the mailed notice of an adverse decision – has also been met in this case. First, because the filing of appellant's complaint should have tolled the 60-day statute of limitations for the full

class, *see American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), the class would not be barred by the running of this statute. *See* 523 F.2d at 696. Second, the Secretary must have abandoned any claim based upon the 60-day limitations period because he has not raised it in the district court. *See* Fed. R. Civ. P. 8(c), 12(h)(i); *Salfi v. Weinberger, supra,* 95 S.Ct. at 2466. For similar reasons, the venue requirement of section 405(g) has been met in this case.

In addition to *Jimenez II* several other federal courts have recently confronted *Salfi* issues. None have examined section 405(g) in a thorough manner, as did *Jimenez II.* Without fully explaining their reasoning, the district courts in *Jablon v. Secretary of H.E.W.*, 399 F. Supp. 118 (D. Md. 1975), *appeals pending* Nos. 75-727 & -739, and *Coffin v. Secretary of H.E.W.*, 400 F. Supp. 953 (D.D.C. 1975), *appeal pending* No. 75-791, have declared *Salfi* to preclude broad class relief in constitutional challenges to the Social Security Act. On the other hand, the district court in *Boles v. Weinberger,* ____ F. Supp. ____, C.C.H. Unemployment Ins. Rptr. ¶14,385 (D.D.C. Sept. 15, 1975), held that

> the failure [of section 405(g)] to expressly provide for injunctive relief does not negate this Court's equitable power to afford such relief either in aid of its jurisdiction or to effectuate its judgment.

Id. at p. 2499-422. Accordingly, the court held that the valid request for injunctive relief necessitated the convening of a three-judge court pursuant to 28 U.S.C. § 2282.[1]

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[1] *Salfi* issues have also been raised by the Government in *Mathews v. Eldridge*, No. 74-204, a due process challenge to the Social Security Administration's termination of benefit procedures, which is now under advisement in this Court.

II.

THE MERITS

A. Proper Standards of Judicial Scrutiny

Because "illegitimacy is not a highly visible characteristic, and the status can be changed" (Govt. Br. 28), the Secretary argues that discriminatory classifications based upon illegitimacy of birth need not be given special judicial scrutiny. There are two brief answers to this assertion. First, this Court has never required that special minorities protected by strict scrutiny be identifiable by sight. Aliens, for example, are just as "visible" as illegitimate children, and this Court has not hesitated to extend special scrutiny to that class. *See Graham v. Richardson*, 403 U.S. 365, 372 (1971); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Second, it should matter little how easily an illegitimate child in appellant's class could shed his or her illegitimate status and be legitimized. "From the point of view of the child it really makes no difference whether options [to legitimatize] were non-existent or simply not exercised." *Eskra v. Morton*, ____ F.2d ____, 7th Cir. No. 74-1906, slip op. at 8-9 (Sept. 29, 1975) (Stevens, J.). Because legitimization procedures are carried out by a child's parents, they are beyond his or her ability to control. Furthermore, by definition, the fathers of appellant's class are deceased. Thus, their aid in any legitimization process is foreclosed.

The Secretary has accordingly made no dent on appellant's claim that discriminatory classifications against illegitimate children must be strictly scrutinized by this Court.

B. Recent Decisions

Since the filing of Appellant's Brief, two federal courts of appeals have encountered the same constitutional issue presented in this case. In *Tanner v. Weinberger*, ____ F.2d ____, 44 U.S.L.Wk. 2209 (1975), the Sixth Circuit rejected the views of the district court in *Norton* and held the "support or residency" requirement of 42 U.S.C. § 416(h)(3)(C)(ii) to be unconstitutional. In *Adams v. Weinberger*, 521 F.2d 656 (1975), the Second Circuit reversed a district court judgment which had upheld the section's constitutionality, by granting the claimant benefits because he had in fact met the Act's support requirement. A constitutional decision was therefore avoided.

These events therefore leave the district court below as the only federal court to have upheld the constitutionality of the extra proof requirement imposed upon appellant's class.[2]

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[2] The Secretary (Govt. Br. 38 n.14) has asserted that this Court was incorrect in *Jimenez v. Weinberger*, 417 U.S. 628 (1974), in stating that "illegitimate children who can inherit their parent's personal property under the intestacy laws of the State of the insured's domicile (42 U.S.C. § 416(h)(2)(A)) ... are entitled to receive benefits without any further showing of parental support." *Id.* at 631 n.2. *See also id.* at 634-35.

We believe this Court's *Jimenez* statement was correct. Such a child would generally be deemed to have been legitimated by meeting the State intestacy laws. *See, e.g., Thomas v. Solis*, 263 Md. 536, 283 A.2d 777 (1971). A child who has been legitimated is deemed dependent by the Act, *see* 42 U.S.C. § 402(d)(3), and accordingly need not meet the "support or residency" requirement. *Accord Massey v. Weinberger*, 397 F.Supp. 817 (D.Md. 1975).

CONCLUSION

For the reasons asserted above and in Appellant's Brief, the judgment of the district court should be vacated and reversed and this case remanded for the entry of an appropriate class and injunctive decree.[3]

Respectfully submitted,

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[3] Attorneys for Appellant gratefully acknowledge the assistance provided in the preparation of this Reply Brief by Michael Gidding and Charles Willis, law school seniors, University of Maryland School of Law.